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10/764,237	01/23/2004	Bruce A. Rogers	ROG030.10005	8491

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EXAMINER

DOAN, ROBYN KIEU

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3732

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/764,237
Filing Date: January 23, 2004
Appellant(s): ROGERS ET AL.

John F. Letchford
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8/15/2008 appealing from the Office action mailed 5/14/2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

An appeal brief was filed in copending application 10/763,846 was a related appeal, however, a notice of allowance was sent out in response to the brief.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

870,330	Wilde	11-1907
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3,546,750	Sheehan	12-1970
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WO 02/058504 Rizzuto, Leandro "Hair Ornament with a resilient attaching clip" August
1 2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 3-7 are rejected under 35 U.S.C. 102(b) as being anticipated by Wilde (United States Patent No. 870,330).

Wilde discloses a device comprising a first body member **a** and a second body member **(at 12)**. The first and second body members include gripping portions 7,11 adapted to be squeezed by a user. Hinge means 19 pivotally connect the body members. The device further includes adjustment means coaxially arranged with respect to the hinge means for causing the gripping portions to remain at a point at which the gripping portions are squeezed together by a user. The adjustment means comprises a slip friction mechanism. The slip friction mechanism includes an irregular first surface 10 associated with the first body member, an irregular second surface 15 associated with the second body member, and a compression spring 18 for maintaining

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contact between the first and second surfaces. The irregular surfaces include toothed surfaces.

Claims 1, 3-7 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Sheehan (United States Patent No. 3,546,750).

Sheehan discloses a device comprising a first body member 22 and a second body member 24. The first and second body members include gripping portions adapted to be squeezed by a user. Hinge means 38 pivotally connect the body members. The device further includes adjustment means coaxially arranged with respect to the hinge means for causing the gripping portions to remain at a point at which the gripping portions are squeezed together by a user. The adjustment means comprises a slip friction mechanism. The slip friction mechanism includes an irregular first surface 32 associated with the first body member, an irregular second surface 35 associated with the second body member, and a biasing mechanism 38 for maintaining contact between the first and second surfaces. The irregular surfaces include toothed surfaces. One of the surfaces is provided on an insert (see figures 4 and 7).

Claims 1, 3 and 12-15 are rejected under 35 U.S.C. 102(e) as being anticipated by Rizzuto (WO 02/058504).

Rizzuto discloses a device comprising a first body member (20) and a second body member (22). The first and second body members include gripping portions (12, 14) adapted to be squeezed by a user (via handles 30, 23). Hinge means 10 pivotally

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connect the body members. The device further includes adjustment means coaxially arranged with respect to the hinge means for causing the gripping portions to remain at a point at which the gripping portions are squeezed together by a user. The adjustment means comprises a slip friction mechanism. The slip friction mechanism includes a first surface 23 associated with the first body member, a second surface 25 associated with the second body member, and a spring 26 for maintaining contact between the first and second surfaces. The spring is a torsion spring connected to each of the first and second body members. The device further includes handle portions 30, 32 on each of the first and second body members.

(10) Response to Argument

Appellant raises a number of issues in his brief which require rebuttal in this examiner's answer.

1) Appellant argues on page 4, lines 24-26 of the brief that Wilde device is an ear ring and the claimed invention is a hair holding device and therefore, Wilde's device would be useless in holding a lock or shock of hair. Also, on page 5, lines 1-14, Appellant argues that the clamping surface areas of the device are very small, and if they were attempted to clamp the hair of the user, they would clamp a few strands of hair. Further, Appellant argues the age of the reference is over 100 years on page 5, line 28 and on page 6, lines 1-8.

It is noted that the terminology "hair holding" is a recitation of the intended use of the claimed invention and a recitation of the intended use of the claimed invention must

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result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In this case, Wilde has shown all the claimed structures as discussed above in the rejections. Also, it is noted that Appellant has agreed that the clamping surface areas of Wilde are capable to hold the hair of the user. How much hair could be retained within the clamping surface areas is subject to the type of the user's hair (thick or thin). The examiner notes that there is no limitation in the present claims regarding the amount of hair the claimed device must hold other than the fact that "strands" is plural, thus indicating that at a minimum the device must be capable of holding two strands of hair. In response to Appellant's argument based upon the age of the references, contentions that the reference patents are old are not impressive absent a showing that the art tried and failed to solve the same problem notwithstanding its presumed knowledge of the references. See *In re Wright*, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977).

2) Appellant argues on page 9, lines 10-25 that Sheehan is a one-way gripping device and the device of the claimed invention permits reverse rotation.

It is noted that the features upon Appellant relies (i.e., a two way gripping device and a reusable device) are not recited in the rejected claims. The rejection over Sheehan is a 102 (b) rejection. All of the claimed structural limitations are met by Sheehan's device. Appellant has failed to point out which elements of Sheehan result in a structural difference that fails to meet the claim limitations.

3) Appellant argues on page 10, lines 10-25 that Rizzutto fails to show adjustment means comprising a slip friction mechanism and the gripping portions are not adapted to be squeezed by a user.

Appellant is noted that Rizzutto does show the slip friction mechanism includes a first surface 23 associated with the first body member (22), a second surface 25 associated with the second body member (20) (see fig. 1). Also, gripping portions (12, 14) do adapt to be squeezed by a user via handle 30, 32 (paragraph 23 of Rizzuto).

4) Lastly, with regard to the affidavit arguments on pages 11-14, as discussed in the final rejections mailed 5/14/2008, the affidavit under 37 CFR 1.132 filed 2/26/08 is insufficient to overcome the rejection of claims 1, 3-7, 11-15 based upon the 102 (b) rejections of Wilde, Sheehan and Rizzuto. Further, both declarations of LaFauci and Revson state that the claimed invention solved a problem that was long felt need in the art. There is no objective evidence that one of an ordinary skill in the art was working on the problem for a long period of time without solution and, if so, how long. Also, there is no evidence that if persons skilled in the art who were presumably working on the problem knew of the teachings of the above cited references, they would still have been unable to solve the problem. Further, the declarations refer only to the system described in the above referenced application and not to the individual claims of the application, thus the declarations fail to show objective evidence of nonobviousness which is commensurate in scope with the claims.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/R.D./

Conferees:

/Cris L. Rodriguez/
Supervisory Patent Examiner, Art Unit 3732

/Janet C. Baxter/
TC 3700 TQAS